95-1681

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1995

STATE OF LOUISIANA, et al.
Appellants
vs.

RAY HAYS, et al.
Appellees

On Appeal From A Three-Judge Panel Of The United States District Court For The Western District Of Louisiana

JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

The basic question presented is:

(1) WHETHER *MILLER v. JOHNSON* CONDEMNS ACT 1 AND LOUISIANA'S FOURTH CONGRESSIONAL DISTRICT AS A RACIAL GERRYMANDER IN VIOLATION OF THE FOURTEENTH AMENDMENT?

The subsidiary questions are:

(2) WHETHER THE DISTRICT COURT ERRED IN ITS APPLICATION OF *MILLER v. JOHNSON* IN HOLDING THAT RACE WAS THE "PREDOMINANT FACTOR" DRIVING THE ENACTMENT OF LOUISIANA'S CONGRESSIONAL REDISTRICTING PLAN?

(3) WHETHER THE DISTRICT COURT ERRED IN APPLYING STRICT SCRUTINY TO LOUISIANA'S CONGRESSIONAL REDISTRICTING PLAN, EVEN THOUGH ACT 1 COMPORTED WITH LOUISIANA'S CUSTOMARY AND TRADITIONAL REDISTRICTING PRINCIPLES?

(4) WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT LOUISIANA'S CONGRESSIONAL REDISTRICTING PLAN, AS EMBODIED IN ACT 1 OF 1994, DID NOT SERVE COMPELLING STATE INTERESTS AND WAS NOT NARROWLY TAILORED TO FULFILL THOSE INTERESTS?

PARTIES

Actual parties to the proceeding in the United States District Court were:

(1) Ray Hays, Edward L. Adams, Susan Shaw Singleton, Gary Stokely, Patricia Slocum, Richard David, Barbara David, Terry Gillespie, Floyd Gonzalez, Richard Sanders, Parks Sansing, Bobby Williams, plaintiffs, appellees herein

(2) State of Louisiana, defendant, appellant herein

(3) Edwin W. Edwards, in his official capacity as Governor of the State of Louisiana, defendant

(4) Samuel B. Nunez, Jr., in his official capacity as President of the Louisiana State Senate, defendant

(5) John A. Alario, in his official capacity as Speaker of the Louisiana House of Representatives, defendant

(6) W. Fox McKeithen, in his official capacity as Secretary of State for the State of Louisiana, defendant

(7) Jerry Fowler, in his official capacity as Commissioner of Elections for the State of Louisiana, defendant

(8) The United States of America, defendant-intervenor, appellant herein

(9) The Louisiana Legislative Black Caucus, defendant-intervenor, appellant herein

(10) Bernardine St. Cyr, Hazel J. Freeman, Donald Thibodeaux, Patrick Fontenot, Janice Frazier, Ralph Wilson, defendant-intervenors, appellants herein

(11) Congressman Cleo Fields, defendant-intervenor, appellant herein

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OPINIONS BELOW

The January 5, 1996, opinion of the three-judge United States District Court for the Western District of Louisiana, declaring Act 1 to be violative of the Equal Protection Clause of the Fourteenth Amendment, has not yet been reported and appears in the appendix ("J.S. App."), Appendix A, at J.S. App. 1. The district court's order and judgment dated January 5, 1996, enjoining further elections under Act 1 and imposing a court-ordered congressional redistricting plan, is unreported and appears in Appendix A, at J.S. App. 39. The district court's July 25, 1994, opinion and order declaring Act 1 to be violative of the Equal Protection Clause of the Fourteenth Amendment, is reported at 862 F.Supp. 119 (W.D.La. 1994)(Shaw C.J., concurring), *vacated*, 115 S.Ct. 2431(1995)[hereinafter *Hays II*], and appears in Appendix F, at J.S. App. 63. The district court's December 28, 1993, opinion, declaring Louisiana's first post-1990 congressional plan to be in violation of the Fourteenth Amendment, is reported at 839 F. Supp. 1188 (W.D.La. 1993), *vacated*, 114 S.Ct. 2731(1994)[hereinafter *Hays I*], and appears in Appendix J, at J.S. App. 105. On August 27, 1992, the district court denied plaintiffs initial request for an injunction, denied the constitutional claims of plaintiffs, state and federal, and took under advisement certain issues under the Voting Rights Act. This memorandum opinion appears in Appendix K, at J.S. App. 178.

JURISDICTION

The judgment holding that Act 1 violates the Fourteenth Amendment was entered on January 5, 1996. Appellant filed a notice of appeal to this Court on February 7, 1996. Appendix D, at J.S. App. 58. Pursuant to Supreme Court Rule 18, this appeal is being docketed within 60 days of January 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment, Section 1

42 U.S.C. §1973

42 U.S.C. §1973c

STATEMENT OF THE CASE

This case concerns the reapportionment of Louisiana's congressional districts. The judgment of the court below invalidated Louisiana's second post-1990 congressional redistricting plan, which the state enacted in April 1994 to comply with an earlier ruling of the same court striking down Louisiana's first congressional redistricting plan enacted in 1992. The merits of this case were previously before this Court in *United States v. Hays*, 115 S.Ct. 2431 (1995), whereby this Court reversed the decision of the district court and dismissed the case due to the plaintiffs-appellees lack of standing.

A. The State's First Congressional Redistricting Plan, Act 42.

The results of the 1990 Census required Louisiana, which has a total population of 4.2 million persons (of whom 30.6% are African American), to redraw its congressional districts. The number of representatives apportioned to Louisiana was reduced from eight and seven. In May, the Louisiana legislature enacted Act 42 of the 1992 Regular Session which redistricted Louisiana into seven congressional districts. Two of the seven congressional districts created by Act 42 were majority black districts. Preclearance of Act 42 was obtained from the U.S. Justice Department, and the state implemented the plan for the 1992 congressional elections.

B. The Legal Challenge to Act 42.

On July 22, 1992, four registered voters in Lincoln Parish, filed suit in the United States District Court for the Western District of Louisiana, alleging that Act 42 violated their rights under, inter alia, the Equal Protection Clause and the Voting Rights Act. A three-judge district court was convened pursuant to 28 U.S.C. § 2284. On August 26, 1992, a hearing on the plaintiffs' motion for preliminary injunction was held. At its conclusion, the district court denied the motion for preliminary judgment, dismissed the plaintiffs' constitutional claims, and took under advisement the plaintiffs' claims brought pursuant to Section 2 of the Voting Rights Act. On June 28, 1993, this Court decided *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816 (1993). The district court recalled its order dismissing the plaintiffs' constitutional claims, and on August 19-20, 1993, held a two-day trial to determine whether Louisiana's plan violated the constitutional standard set forth in *Shaw*.

On December 28, 1993, the three-judge district court issued an opinion and order holding that Act 42 violated the Equal Protection Clause. Appendix J, at J.S. App. 105. Applying strict scrutiny, the court held that Act 42, assuming it was supported by a compelling state interest, was not narrowly tailored. The court found that District 4, with a black voting age population ("VAP") of 63%, packed more black voters into the district than were "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there." Appendix J, at J.S. App. 150. The court further criticized the unusual shape of District 4 (see map, Appendix J, at J.S. App. 158) and reasoned that "a second majority black district could have been drawn that would have done substantially less violence to traditional redistricting principles." Appendix J, at J.S. App. 153. The State appealed the decision to this Court.

While the State's appeal to this Court was pending, the Legislature enacted a new congressional plan on April 25, 1994. The new plan, Act 1, is the subject of this appeal. (See map, Appendix O, at J.S. App. 194). Following the enactment of Act 1, this Court granted Louisiana's motion to vacate the December 28, 1993 decision of the three-judge court and remanded the case for further proceedings in light of Act 1. *Louisiana v. Hays*, No. 93-1539 (Order dated June 27, 1994).

C. The State's Second Congressional Redistricting Plan, Act 1.

In revising its redistricting plan, the Louisiana Legislature sought in good faith to comply with both the Voting Rights Act and the lower court's earlier decision in *Hays I* invalidating the state's first congressional plan. In crafting the plan that became Act 1, the Legislature created two majority African American districts while also employing traditional redistricting criteria and non-racial considerations. These criteria included the drawing of reasonably compact districts, the preservation of cores of various congressional districts enacted in prior reapportionments, reasonable efforts to preserve parish and municipal boundaries, political fairness and impact on incumbents, and compliance with both the one-person, one-vote requirement of the Fourteenth Amendment and the provisions of the Voting Rights Act.

In crafting District 4, the focus of this litigation, the State Legislature reviewed its congressional districts during the 1970's and 1980's and attempted to model the new District 4 on old Congressional District 8. New District 4, which is approximately 54% black in voting age population, extends along the Red River, Louisiana's second largest tributary. Persons living along the Red River valley have historically shared commonalities of interest, including income levels, job status, education, and social concerns.

The Legislature recognized that voting is extremely racially polarized in Louisiana and that black citizens, who comprise 30.6% of the population, do not enjoy an equal opportunity to elect their preferred candidates to Congress unless they constitute a majority of the voters in a district. The legislature also was mindful of the district court's 1993 finding that "a second majority black district could have been drawn that would have done substantially less violence to traditional redistricting principles," Appendix J, at J.S. App. 153, and that a district excessively "packed" with black voters would not be considered narrowly tailored. All of these considerations were successfully balanced in Act 1, which received the necessary Section 5 preclearance from the Attorney General on June 3, 1994.

D. The Legal Challenge to Act 1.

After the passage of Act 1, the four plaintiffs who had challenged Act 42 filed a motion to amend their complaint to challenge Act 1 on equal protection grounds. On July 6, 1994, the court granted the plaintiffs' motion to amend the complaint. The court also granted a motion filed by the United States to intervene as of right, but denied motions to intervene filed by black voters in District 4 and the Louisiana Legislative Black Caucus. The district court set the matter for trial on the merits to begin on July 21, 1994.

Trial proceeded on July 21-22, 1994, with the State required to proceed first with its proof. At the conclusion of the State's case, before the plaintiffs had called any witnesses, the court granted the plaintiffs' oral motion for judgment as a matter of law, announcing from the bench that Act 1 was unconstitutional and enjoining the State from holding future elections under Act 1. The basis for the court's decision was its finding that District 4 as provided in Act 1 was drawn on the basis of the race of the voters and therefore constituted a racial gerrymander. The court disregarded the evidence introduced by

the defendants establishing that Act 1, including its district 4 was a result of many factors, and not solely drawn on the basis of race. Further, the court found that the state did not have a compelling interest in using race as a factor in drawing District 4. Subsequently, on July 22, 1994, the district court, ordered into effect its own congressional redistricting plan. Appendix F, at J.S. App. 87. The district court entered its written opinion on July 25, 1994. Appendix F, at J.S. App. 63.

The State defendants and the United States appealed the district court decision to this Court. The matter was orally argued on April 19, 1995. On June 29, 1995, this Court rendered a decision reversing the trial court and dismissing the suit for lack of standing. *United States v. Hays*, 115 S.Ct. 2431 (1995).

On July 10, 1995, the four original plaintiffs, whom this court declared were without standing to maintain the suit, sought to amend their complaint to include additional plaintiffs who resided in the fourth congressional district. Over the objections of the defendants and defendant-intervenors, the district court allowed the original plaintiffs to continue their suit and amend their complaint. The court also allowed the Louisiana Legislative Black Caucus, Congressman Cleo Fields, (the incumbent in District 4), and certain black voters in District 4 to intervene.

Trial was held on October 30-31,1995. The entirety of the record from the previous hearings was admitted into evidence. The other evidence introduced by the defendants and the defendant-intervenors corroborated the evidence from the prior proceedings that indicated the necessity and reasonableness of Act 1, and established that Act 1 was indeed valid under *Shaw v. Reno*, supra, and *Miller v. Johnson*, 115 S.Ct. 2475 (1995).

Despite the evidence establishing the validity of Act 1, the district court again declared it unconstitutional and permanently enjoined its implementation. In its stead, the court or-

dered that the 1996 Louisiana congressional elections, and all subsequent congressional elections, be conducted pursuant to the court's own plan that contained only one majority-minority district of the seven congressional districts, in a state in which 30% of the citizens and 28% of the registered voters are African-American. The appellants sought a stay from the district court of its order enjoining the implementation of Act 1. The district court denied the stay applications on February 21, 1996, Appendix B, at J.S. App. 54, and on February 28, 1996, Appendix C, at J.S. App. 56.

THE QUESTIONS ARE SUBSTANTIAL

Louisiana's congressional redistricting plan at issue in this appeal, Act 1 of 1994, is the same plan that was before this Court last term. Because the previous appeal was dismissed due to the appellees' lack of standing, the substantive issues raised in this appeal are the same as the prior appeal in which this Court noted probable jurisdiction.

This case brings to this Court the issue of the constitutionality of a congressional redistricting plan that has been drawn subsequent to this Court's decision in *Shaw v. Reno*. It is the first case before this Court in which a legislature drew a redistricting plan for the specific purpose of complying with the *Shaw* decision. As set forth above, the Louisiana legislature, in enacting Act 1, revised its previous redistricting plan by replacing a 600 mile long, 63% black district with a district approximately 260 miles in length that contains only 55% registered black voters and comports Louisiana's past districting practices. The maps contained in Appendix O, at J.S. App. 194 and Appendix P, at J.S. App. 198 indicate that the districts employed in Act 1 resemble those utilized by Louisiana's past congressional districting plans, a clear indication that Louisiana did not subordinate or abandon its traditional districting practices in order to create a majority-minority district.

Nevertheless, the district court, as it did 1994, again declared Act 1 unconstitutional. In so doing, the district court misconstrued this Court's *Miller v. Johnson* and *Shaw v. Reno* decisions, failed to give Louisiana's past and present districting plans any presumption of validity, and substituted its own subjective redistricting preferences and objectives for that of the state. The court created its own redistricting plan, obliging the state to carry out the court's preferences and objectives, rather than that of the citizens of Louisiana, as expressed through their elected representatives.

This Court should note probable jurisdiction to resolve the far-reaching questions which this case presents concerning the proper application of the Fourteenth Amendment to legislatively enacted redistricting plans—questions erroneously resolved by the court below.

I. THE DISTRICT COURT ERRED IN HOLDING THAT ANY INTENTIONAL CREATION OF A MAJORITY-BLACK DISTRICT RENDERS A PLAN PRESUMPTIVELY UNCONSTITUTIONAL AND SUBJECT TO STRICT SCRUTINY BY FEDERAL COURTS.

The district court misread *Miller v. Johnson* and *Shaw v. Reno* to establish a sweeping rule invalidating legislatively enacted redistricting plans: any intentional creation of a majority-black election district renders a state's congressional redistricting plan constitutionally suspect.

In *Shaw*, this Court "express[ed] no view as to whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim." 113 S.Ct. at 2828. In *Miller*, this Court again ruled that race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional. Rather, a plaintiff must not only establish that race was the "predominant" fac-

tor in creating the district, but also must do so by proving that the state "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." 115 S.Ct at 2488.

A. The factors included in the drawing of Louisiana's congressional plan, Act 1.

The record in this case establishes that the challenged district, District 4 of Act 1, was created, not in substantial disregard of, but pursuant to the state's customary and traditional districting practices. The evidence shows that the state modeled District 4 after various versions of District 8 as contained in the state's previous congressional redistricting plans. Copelin Test., La. Exh. 1 (1994), House Comm. 4/18/94 Tr. 46; Brinkhaus Test., 7/22/94 a.m., Tr. 21; La. Exh. 18 (1994), Jetson Decl. 2; La. Exh. 16 (1994), Accardo Decl. 3; Koepp Test., 7/21/94 a.m., Tr. 25; see also Koepp Test., 7/21/94 a.m., Tr. 20-21, 23.

Undaunted by those record facts, the district court parted with *Miller* and *Shaw*, disregarding Louisiana's past districting practices because, the court noted, those past practices were never "challenged on constitutional grounds." Appendix A, at J. S. App. 17, FN 48. This was error. The district court was obligated to treat Louisiana's prior plans as presumptively valid, not presumptively unconstitutional. *See Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149, 1156-57 (1993).

A mere viewing of the maps of the state's earlier districting plans confirms that District 4 resembles districts utilized by Louisiana in the past. It is uncontroverted that during both the drafting process and the legislative debates on the plan that was ultimately enacted as Act 1, the legislators and staff were well aware of the prior districting plans, and considered dis-

trict 4 to be a progeny of those previous plans. Copelin Test., La. Exh. 1 (1994), House Comm. 4/18/94 Tr. 46; Brinkhaus Test., 7/22/94 a.m., Tr. 21; La. Exh. 18 (1994), Jetson Decl. 2; La. Exh. 16 (1994), Accardo Decl. 3; Koepp Test., 7/21/94 a.m., Tr. 25; see also Koepp Test., 7/21/94 a.m., Tr. 20-21, 23.

Although different versions of District 8 were created by the state from the late 1960's until the state lost its eighth congressional seat as a result of the 1990 census, all, like the present district 4, cut diagonally across the state, roughly following the Red River and Mississippi River. In one version, the district extended from the Texas border in the Northwest to the shores of Lake Ponchartrain in the southeast, a distance of approximately 250 miles. Appendix P, at J.S. App. 196.

The district court's summary dismissal of the similarity of the "Old Eighth" to District 4 as "spurious" underscores that court's grievous misapplication of *Shaw* and *Miller*, and demonstrates the district court's "itch" to condemn Act 1 solely because it did not conform to the court's own subjective eyeballing of District 4. Appendix A, at J. S. App. 16. *Miller* and *Shaw* logically instruct that the appropriate point of reference for the inquiry of whether race "predominates" the redistricting process, is the state's past redistricting practices.

The district court's finding, twice repeated, that "race was the 'fundamental factor' driving the design of Act 1," *Hays II*, 862 F. Supp. at 122; *Hays III*, Slip Op. at 14, is clearly erroneous in law and fact. To say that "race alone predominated the design of District 4," *Hays III*, Slip Op. at 16, blinks the record in this case with a blindness that, with all respect, is quite amazing. Here is what Glenn Koepp, Assistant Secretary of the Louisiana Senate, who drew the new plan told the district court about its design:

> There was some, I guess a lot of discussion during that period about what the Hays case meant. And a lot of confusion on some people's parts and not others. There was discussion of

whether or not the case said you couldn't have two minority districts, whether it said you could create two minority districts, and I think the general opinion came out and my opinion was that this case and this court didn't say you cannot have two minority districts in Louisiana nor did it say you had to have two minority districts, but it did set down some guidelines for redistricting. We started looking at that.

***

And with that in mind, with looking at the various groups that played in this I started working somewhat independently on my own but with directions from numerous senators in trying to come up with a plan that would meet this Court's requirements, that would do as little disruption as possible to the present districts and the incumbents in those districts, and that could possibly get consensus in the legislature and be passed.

Q. Let me interrupt you. What about preclearance by the Justice Department in compliance with Section two?

A. Absolutely. We knew as soon as we adopted the plan and the Governor signed it we had to submit it to the Justice Department for preclearance and we were—I think if you will look at the testimony of the committee on both sides we really felt that not only did we have to get preclearance from the Justice Department in what we did but we had to also have that plan looked at by this Court and have their evaluation of that plan in light of the Shaw and their previous decision in this case. And I took all that into consideration.

***

One of the big factors that started to play in this was I was asked to look at the old Eighth District, the old Eighth District being the highest minority population district in the state other than the minority district number two in Orleans and see what I could do to go off that creating a dis-

trict and what the different districts would fall in line to after that. And I went back, not just to the 1981 congressional plan, but back to the beginning of the 1970 or late '60's legislation—

***

JUDGE SHAW: But Act One—you took this map that's under the direction of members of the State legislature, you were not free to draw a map as you so desired; is that correct?

THE WITNESS: Actually, I drew this as I so desired. The first name on this particular plan and the way it's put together carried my name.

JUDGE SHAW: I understand. But you were free to draw this on your own?

THE WITNESS: Yes, sir.

***

JUDGE WALTER: Let me ask it again. You started off with the idea that whatever happens, I'm going to wind off-wind up with one man, one vote and two majority, minority districts?

THE WITNESS: No, sir.

JUDGE WALTER: That is not where you started?

THE WITNESS: No, sir.

JUDGE WALTER: That's what I've been hearing you say.

***

THE WITNESS: No, sir. If I said that, that's not what I meant. What we were doing was attempting to meet all of the criteria if, in fact, when I finished trying to draw that and there was no way to put together a minority district other than a very bizarre way or if you in the creation of a

> minority district it may derive serious gerrymandering in other areas, then I don't think—know the legislature would not have adopted it, that type of plan.[1]

While criticizing Louisiana for any reliance on the "untested" old 8th Congressional District, the court's decision below also hedged its bets by stating that the creation of a district reflecting the old 8th District was a mere guise for amassing a large percentage of minority voters into one district and not as a means of following traditional districts. Appendix A, at J.S. App. 16. The district court's reasoning has it exactly backwards. If Louisiana had refused to create a second black-majority district on the grounds that the district would be insufficiently compact, the federal courts could easily have found that excuse to be a pretext for discrimination, given that Louisiana has had a similarly configured majority white district in the same general area of the state for the last 25 years. If Louisiana law provided that configurations such as the old 8th District may be used only for white-majority districts, and not for black-majority districts, that law would clearly be unconstitutional. The decision below reads into the Fourteenth Amendment just such a discriminatory rule, contrary to Justice O'Connor's admonition in *Miller:*

> To invoke strict scrutiny, a plaintiff must show that the State relied on race in substantial disregard of customary and traditional districting principles. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries in favor some other ethnic group; *certainly the standard does not treat efforts to create majority-minority districts less favorably than similar efforts on behalf of other*

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[1]These connected record excerpts are Glenn Koepp's testimony before the district court on July 21, 1994, Morning Session, which appears in the Joint Appendix filed in this Court in Nos. 94-558 and 94-627, United States v. Hays and State of Louisiana v. Hays, respectively, pp. 34-49.

> *groups*. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks. 115 S. Ct. at 2497 (O'Connor concurring) (emphasis added).

In *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D. Cal. June 27, 1994), *aff'd* in part, appeal dismissed in part, 115 S.Ct. 2637 (1995), the district court upheld California's race-conscious redistricting plan against a constitutional challenge by white voters, holding that the plan was not subject to strict scrutiny because it evidenced a "judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process." *Id*. at 1413-1414.

The district court decision in the instant matter is the antithesis of the *DeWitt* decision. Rather than considering the many factors that played a part in Louisiana's redistricting, the district court focused on race to the exclusion of all other factors, effectively invalidating Act 1 solely because the legislature, in enacting the plan, was "race-conscious".

Act 1, while creating two majority-black districts, is also the product of other traditional redistricting principles and non-racial factors including partisan fairness, the historic configuration of Louisiana's congressional districts, reasonable preservation of political boundaries, and the existence of commonalities of interests among populations in particular districts. Thus, like the California plan upheld in *DeWitt*, Louisiana's congressional redistricting plan evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process.

Although the district court attempted to rephrase its earlier decision using the terminology of *Miller*, the practical effect of its ruling is to require strict scrutiny for any intentional consideration of race. It ignores the practical circumstances under which redistricting takes place. Majority-minority districts are almost never created "accidentally." State legislators and incumbent congressional officeholders are always aware of the likely political consequences of drawing any district, including black- majority districts. In many states, the objections of white incumbents must often be overcome in order to draw any non-white majority district. None of this happens "accidentally." Moreover, legislators routinely consider the race, ethnicity, and religion of those to be included in white-majority districts as well as non-white majority districts. A blanket application of strict scrutiny to such practices would, if enforceable, render presumptively unconstitutional virtually every districting plan currently in force in the nation.

A rule requiring strict scrutiny of any plan creating an intentionally drawn majority-black district also creates an intolerable conflict with states' obligations to assure compliance with the Voting Rights Act. Section 2 of Voting Rights Act, 42 U.S.C. § 1973, makes unlawful any state redistricting plan that, under the totality of circumstances, results in a denial of equal political opportunity to racial and language minorities. *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986). Section 2 requires states to consider carefully the likely impact of their redistricting plans on minority voters. States that draw majority-minority districts to assure compliance with the Voting Rights Act always do so intentionally — not "accidentally."

If a state's consideration of race automatically subjects its plan to strict scrutiny, states will be forced to choose between considering race and facing a Fourteenth Amendment chal-

lenge by white voters, or ignoring race and facing a Voting Rights Act challenge by minority voters or the Justice Department. The end result of such a legal regime would be the wholesale transfer of the reapportionment process to the federal judiciary, contrary to the central principle that state governments bear primary responsibility for redistricting.

This Court's constitutional jurisprudence must permit a proper balance between state responsibility and federal court oversight, one which acknowledges that state legislatures are entitled to substantial deference in balancing the commands of the Constitution, the Voting Rights Act, and the state's own political interests in redistricting. The proper balance will be struck if states are presumed to act lawfully when their redistricting plans, like Louisiana's, do not unnecessarily "pack" excessive numbers of blacks in relation to their numbers in the population, and are not dramatically more irregular in shape than white-majority districts previously drawn by the state.

The district court here, however, erroneously held that a plan meeting all these criteria is presumed to be illegal, a plainly insupportable conclusion, contrary to the presumption of good faith that *Miller v. Johnson* mandates be afforded to the Louisiana Legislature in the exercise of its political judgment—which was well balanced and not controlled by racism—aimed at reasoned compliance with, not mere obeisance to, the Voting Rights Act and equal opportunity for minorities too long shut out of the Halls of Congress. "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995). "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enters a legislature's redistricting calculus." *Id.*

II. THE DISTRICT COURT ERRED IN FINDING THAT ACT 1 DID NOT SERVE COMPELLING STATE INTERESTS AND WAS NOT NARROWLY TAILORED TO FULFILL THOSE INTERESTS.

The district court, after concluding that Act 1 was subject to strict scrutiny, held that neither of the state's objectives, compliance with the Voting Rights Act and remedying past discrimination, warranted the creation of District 4.

A. Compliance with the Voting Rights Act.

The district court held that the creation of District 4 was not necessary in order to comply with the Voting Rights Act because the state could not satisfy the necessary requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986), to make out a vote dilution claim under Section 2 of that Act. In *Gingles*, this Court held that three factors must be satisfied in order to establish a Section 2 claim: (1) the possibility of creating a reasonably compact district; (2) a politically cohesive minority group; and (3) white block voting that results in the usual defeat of minority preferred candidates.

The record shows that voting is racially polarized in Louisiana, such that white block voting prohibits blacks from electing candidates of their choice, unless blacks constitute a majority in the election district. La. Exh. 13 (1994); Engstrom Decl. at 9. As a result, since reconstruction no black candidate has been elected to statewide office, and no black candidate has been elected to congress or to the state legislature from a district in which white voters constitute a majority. The district court acknowledged that racial bloc voting is a "fact of contemporary Louisiana politics." Appendix A, at J.S. App. 6, n. 17. But the district court concluded that Section 2 did not require the creation of District 4, because it concluded that the state could not satisfy the "reasonably compact" requirement of *Gingles*. This conclusion is clearly erroneous and based upon an incorrect in-

terprelation of the governing legal standard.

The test for "reasonable compactness" under *Gingles* is not a comparison to some absolute compactness standard, *Clark v. Calhoun County*, 21 F.3d 92 (5th Cir. 1994), but rather, whether it is reasonably consistent with past redistricting practices. In *Jeffers v. Clinton*, 730 F.Supp. 196, (E.D.Ark. 1989)(three-judge court), *aff'd mem.*, 498 U.S. 1019 (1991), this Court affirmed the district court's decision that held that the proposed majority-minority districts, although somewhat irregular in configuration, satisfied the *Gingles* compactness factor because they were "not materially stranger in shape" than other legislatively drawn districts. *Id.* at 207. As discussed above, district 4 is consistent with, and not contrary to, Louisiana's past redistricting practices.

In applying the *Gingles* factors to Louisiana's congressional redistricting, the record firmly establishes that the legislature correctly concluded that the state could reasonably be subject to a Section 2 claim unless a second majority-minority district was created. The legislature was therefore justified in taking race-conscious action to assure compliance with federal law when there was "a firm basis for concluding that remedial action [is] appropriate." *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

B. Remedying past discrimination.

The district court while acknowledging that there is a "significant state interest in eradicating the effects of past racial discrimination," and that Louisiana had a "well-documented history of racial discrimination with regard to its voting policies," concluded "[b]ut history it is; and we are constrained by the fact that the defendants have failed to provide any concrete evidence of the lingering effects of past discrimination in current voting laws and procedures." Appendix A, at J.S. App. 20. With this statement, the court below completely discounted

that which it previously acknowledged, that racial bloc voting is a fact of contemporary Louisiana politics, and ignored the obvious, that such is a lingering effect of past discrimination.

The trial court's conclusion that Louisiana minorities no longer suffer the effects of past discrimination in voting is clearly contrary to the record in this case. This blindfold approach is reflected in the trial court's apparent belief that the mere passage of the Voting Rights Act remedied all racial discrimination in voting.

> JUDGE WALTER: I'm sorry. I don't understand. What wrong are you seeking to remedy this?
>
> GLENN KOEPP: Well, one of the things is our past history of racial discrimination. That's what the Voting Rights Act, as I understand it, the Voting Rights Act was about.
>
> JUDGE WALTER: Didn't the Voting Rights Act remedy racial discrimination in voting?
>
> GLENN KOEPP: No, Sir. Joint Appendix, Nos. 94-558 and 94-627, pp. 50-51.

And more:

> SENATOR DENNIS BAGNERIS: I don't know if I can answer your question any different than I have, judge. There is and has been and continues to be racial discrimination in this state; and it is believed, we, the minority population, the African American population in this state—if I may speack one of its representatives—that the way to overcome that is to put into power those persons who can best share and interest, help make the laws, help enforce the laws. To me, it is simple and clear-cut; and evidently I haven't been able to close that line and answer it for you. But I can't use any different words that I have already used.
>
> JUDGE WALTER: What bad things will flow from not having a second majority minority?
>
> SENATOR BAGNERIS: Well, the opposite. You have

> less of an opportunity. You have less of access. The playing field is less level. There have been those who have stated that influentials, so-called influential districts might be more to the advantage of minority population; and perhaps we are cutting our own throats, our wrists when we created districts that are more majority minority. I think when you look at the affect and the success of those districts that have been referred to as influential districts have had, I would prefer to have a minority majority opportunity of election of choice of candidate or candidate of choice. Joint Appendix, Nos. 94-558 and 94-627, pp. 99-100.

Contrary to the district court's view, the record clearly shows the Louisiana Legislature considered Act 1 necessary to remedy the effects of past discrimination and thus its purpose was to overcome racial bloc voting and the documented exclusion of Louisiana's black citizens from the political process. *See* Koepp Dep. 115; Bagneris Test. 7/21/94 p.m., Tr. 106-017, 109-10; Koepp Test., 7/21/94 a.m., Tr. 20-21; Brinkhause Test. 7/22/94 a.m., Tr. 34-35; La. Exh. 17 (1994); Accardo Decl.

It is clear that a vestige of the state's past discriminatory practices is racial bloc voting, whereby minorities are denied an opportunity to elect candidates of their choice except in majority-minority districts. The evidence clearly indicates that in Louisiana, it is not a stereotype that whites and blacks vote along racial lines — it is a fact. Thus, the creation of a majority-minority district in Louisiana does not promote the racial stereotyping decried in *Shaw* and *Miller*, but rather minimizes the effects of the existing stereotyping by remedying the effects of racial bloc voting.

Racial bloc voting has existed in Louisiana long before the legislature ever drew a majority-minority district. Thus, to the extent that racial bloc voting is a result of the racial stereotyping decried by *Shaw* and *Miller*, majority-minority districts are not the cause. Rather in those instances, as shown here, where

voting along racial lines prohibits equal participation by minorities, majority-minority districts are necessary to remedy the effects of racial stereotyping on the voting process.

C. Proof of a reasonable belief for remedial action.

Louisiana demonstrated that the inclusion of two black-majority districts in Act 1 was supported by its compelling interest in complying with the Voting Rights Act and over-coming past racial discrimination against the State's black citizens. The court below seriously misconstrued this Court's precedents in dismissing all of these compelling interests as inadequate and erred in concluding that Act 1 did not further such compelling state interests.

In *Wygant v. Jackson Board of Educ., supra*, this Court held that a state actor may take race-conscious action to assure compliance with federal law when "there is sufficient evidence to justify the conclusion that there has been prior discrimination." 476 U.S. at 277 (plurality opinion); see also *id.*, at 286 (O'Connor, J., concurring)(specific finding of prior violation of law not necessary to demonstrate remedial purpose "as long as the public actor has a firm basis for believing that remedial action is required"). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989)(plurality opinion).

The district court, however, asserted that a compelling state interest was lacking because the State was unable to prove that its refusal to create a second majority-black district would in fact have been unlawful. Appendix A, at J.S. App. 18. This was error of law.

The relevant question defined in *Wygant* and *Croson* is whether the state actor had a reasonable basis for believing that remedial action was necessary, not whether the state actor can prove an actual violation of federal law. See *Wygant*, 476 U.S. at 292 (noting that the requirement of a remedial purpose

does not mean "that the court must take an actual finding of prior discrimination based on the [state actor's] proof before ... [race-conscious action] will be upheld") (O'Connor, J.).

Judged under the proper standard, the evidence adduced by Louisiana was more than adequate to satisfy any burden of production showing a firm basis in fact for believing that a plan with only one majority-black district would be vulnerable to challenge under Section 2 of the Voting Rights Act. After the State produced this evidence, the plaintiffs' evidence was insufficient to carry their "ultimate burden" of overcoming the State's showing of a remedial purpose. *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring). The district court, therefore, clearly erred in ruling that the plaintiffs had satisfied their burden of proof on this issue.

Finally, the creation of a second majority-black congressional district was fully justified as a means to overcome patterns of racially polarized voting in Louisiana which have excluded African American political representation in majority-white election districts. Jurisdictions may take steps to improve minority citizens' access to the political process even if such steps are not compelled by the Voting Rights Act. Certainly a parish could voluntarily expand the number of elected parish officers so as to help overcome minority exclusion from elected office, without thereby subjecting its decision to strict scrutiny, even though such action could not be compelled under the Voting Rights Act in light of this Court's decision in *Holder v. Hall*, 114 S. Ct. 2581 (1994). So too, states have a strong and compelling interest in drawing election districts that afford historically disfranchised minorities equal political opportunity, even if a court might ultimately hold that the Voting Rights Act does not require such districts.

D. Act 1 is narrowly tailored.

The district court also erred legally in holding that Act 1

was not narrowly tailored to further the state's compelling interests. The district court's sole basis for its conclusion is its eyeball belief that district 4 is not reasonably compact. As discussed above, the district court's belief is unfounded, because district 4 conforms to the state's customary districting practices, and is therefore reasonably compact under Louisiana's traditional standards of compactness.

District 4, containing only 54% black voting age population, does not unnecessarily "pack" black voters or exclude white voters, but rather is the most integrated of all the districts. Act 1 also furthers the state's non-racial goals of partisan balance and regional fairness, and fairly addresses incumbency concerns.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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